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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

21 Cr. 446 (VSB)

5 ANDREW FRANZONE,

6 Defendant.

7 -----x
8 New York, N.Y.
9 September 26, 2023
2:00 a.m.

10 Before:

11 HON. VERNON S. BRODERICK,

12 District Judge

13 APPEARANCES

14 DAMIAN WILLIAMS,

15 United States Attorney for the
Southern District of New York

16 BY: KIERSTEN FLETCHER

Assistant United States Attorney

17 DEBORAH COLSON

18 Attorney for Defendant

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1 (Case called)

2 THE COURT: If I could ask counsel to please identify
3 themselves for the record.

4 MS. FLETCHER: Good afternoon, your Honor. Kiersten
5 Fletcher for the government.

6 THE COURT: Good afternoon.

7 MS. COLSON: Good afternoon, your Honor. Deborah
8 Colson for Mr. Franzone. I'm also joined by Ben Silverman, who
9 has decided to sit in the audience because he has to leave
10 early.

11 THE COURT: It wouldn't disturb me. It's up to you if
12 you want to sit at counsel table, but that's fine.

13 So this matter is on today for oral argument on the
14 motion related to the Google search warrant. I note that the
15 parties have indicated a desire and I think it makes sense to
16 set a trial date. So I want to talk about that first because
17 there are several options. One is I have a civil case, which
18 is scheduled to start a four-week trial on May 6th. It's been
19 pending for a while. I could double-book, but what I suggest
20 is the following: We should schedule something in June and if
21 that case goes away and the parties are available, I can move
22 this trial date to May 6th if that works.

23 First, would a date in June work for the government?

24 MS. FLETCHER: The government's fine with May or June.

25 THE COURT: Ms. Colson.

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1 MS. COLSON: Your Honor, we are available in June. I
2 think, though, that we would prefer not to set a trial date
3 today. It's the government's wish to set the trial date. Our
4 preference would be to have these motions resolved first.
5 There's also an additional motion we are considering filing.
6 And so --

7 THE COURT: Okay. I guess I don't have a problem --
8 well, let me ask this question, and I'm not in any way
9 indicating how I might rule. If I rule in the favor of the
10 defense on all of the information that they've requested, I'm
11 just trying to gauge whether the government would still go to
12 trial.

13 MS. FLETCHER: Yes, your Honor. The motions, while
14 important, are not dispositive and the government has
15 sufficient evidence, in its view, to proceed to trial, even if
16 the Court suppresses all of the evidence that's the subject of
17 the pending motions.

18 THE COURT: My concern, Ms. Colson, with not setting
19 something is that people's calendars will fill up and then it
20 will push it out even further. I believe I've got things that
21 are later in the summer and the fall, so I would like to put
22 something in the calendar now so that if either of you are in
23 front of another judge and the judge wishes to set a trial
24 date, you can let the judge know you're already occupied during
25 that time period. I know some of my colleagues do double-book,

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1 but what that would mean is if -- well, why don't we set it
2 down for June, and if it turns out the May trial goes away, I
3 can see whether the parties are available.

4 So my May trial is scheduled to be three or four
5 weeks, I think it's probably more around two, but why don't we
6 say that we would start sometime in the first week or the
7 second week of June.

8 What is the second week of June?

9 THE DEPUTY CLERK: June 10th.

10 THE COURT: So June 10th.

11 Ms. Colson, does that work for your schedule?

12 MS. COLSON: Yes, it does. Thank you.

13 THE COURT: So we'll set this matter on for June 10th.
14 As soon as I find out about the May trial, I'll let the parties
15 know, and if you're available and want to accelerate the trial,
16 I obviously don't have an objection to that. That other case,
17 I'm not sure because it actually may be one of the rare civil
18 cases that ends up going to trial in light of the allegations
19 in the complaint that have survived summary judgment.

20 So my plan was to go through the questions that I had
21 placed in the order, see if there's any amplification. I did
22 receive, Ms. Colson, your September 25th letter with responses
23 to the questions, see if the government has any comments on any
24 of the issues I inquired about. I do have some followup
25 questions as we go through. In regard to the Google motion,

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1 I'll let the parties either emphasize or make any points that
2 they wish to in regard to their papers or make any other points
3 that they think are salient to the motion.

4 Now, with regard to the speedy trial clock, I'm going
5 to exclude the time between now and our June 10th trial date.
6 I'll issue an order with regard to *voir dire* and requests to
7 charge, motions *in limine* and the like, and also in that order
8 schedule a final pretrial conference for the case.

9 I'm going to exclude the time between now and
10 June 10th from the time within which Mr. Franzone would have to
11 be brought to trial. I find that that exclusion outweighs the
12 interests of the public and Mr. Franzone in a speedy trial.
13 That time is necessary for me to complete the review and
14 decisions on the outstanding motions, but also allow counsel to
15 prepare for trial on June 10th.

16 Yes.

17 MS. FLETCHER: Sorry, your Honor. While we're still
18 on the matter of scheduling and the scheduling order, I heard
19 Ms. Colson say she's contemplating an additional motion.

20 THE COURT: Right. What is the nature of the
21 additional motion, Ms. Colson?

22 MS. COLSON: We haven't decided yet, but it's possible
23 we would like to file a motion for disclosure of the grand jury
24 minutes. So not an extensive motion.

25 THE COURT: Just so I'm clear, when you say you

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1 haven't decided, you haven't decided whether or not to file
2 that motion or are there other motions that are --

3 MS. COLSON: No, whether or not to file that motion.

4 THE COURT: All right. Again, I don't know what the
5 underlying basis would be, but what's the timing of that? In
6 other words, when do you think you'll make the decision with
7 regard to that?

8 MS. COLSON: I think, your Honor, if we could set a
9 date for that motion now, sometime in November. We will let
10 the Court know long before that whether we intend to file the
11 motion.

12 THE COURT: You said sometime in November?

13 MS. COLSON: If we could set a date for the motion in
14 November and we'll let the Court know before that whether we
15 intend to file the motion.

16 THE COURT: And you don't need to tell me if it's not
17 fully baked, but is there some impropriety that you believe
18 occurred in the grand jury?

19 MS. COLSON: Your Honor, it's definitely not fully
20 baked, in part because we're still getting a grasp on the
21 discovery in this case, which is quite voluminous.

22 THE COURT: If we could get a date in November. Why
23 don't you make it early November.

24 THE DEPUTY CLERK: November 6th.

25 THE COURT: So November 6th for the opening motion. I

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1 know in two weeks, there's going to be Thanksgiving. So let me
2 ask Ms. Fletcher, when do you think you'd be able to get an
3 opposition in?

4 MS. FLETCHER: Thank you, your Honor.

5 Perhaps a date in early December.

6 THE COURT: Ms. Disla.

7 THE DEPUTY CLERK: December 4th.

8 MS. FLETCHER: That's fine, your Honor. Thank you.

9 THE COURT: Ms. Colson, on reply?

10 MS. COLSON: Two weeks after that, your Honor.

11 THE DEPUTY CLERK: December 18th.

12 THE COURT: December 18th.

13 So we'll have opening motions, to the extent there is
14 a motion, November 6th, any opposition December 4th, and
15 replies December 18th.

16 I don't think there's a connection, but as you're
17 considering the motion, Ms. Colson, is there any connection
18 between -- I don't know who the witness or witnesses were in
19 the grand jury, but any connection that you see between the
20 current motions and the one you're considering?

21 MS. COLSON: Yes. Obviously we don't know who the
22 witnesses were in the grand jury either, but we suspect we
23 know. And so, yes, there is a connection.

24 THE COURT: I'm going to proceed with these motions,
25 and then if I need to revisit something, I can do that,

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1 obviously.

2 MS. COLSON: Okay.

3 THE COURT: All right. So with regard to the first
4 question, that was just a question about the *Hersch v. FF Fund*
5 litigation.

6 Let me ask, I don't remember and it only occurred to
7 me, so I didn't look through the papers, was the complaint in
8 the civil case referenced in the complaint in the criminal case
9 or in the search warrant affidavit?

10 MS. FLETCHER: Not explicitly, no. Maybe this is what
11 your Honor's question is getting at. Some of the allegations
12 in that complaint are similar to the allegations that the
13 wealth manager conveyed to the government that are conveyed in
14 the complaint, but the affidavit I don't believe, your Honor,
15 incorporates a review of the filings in that case by reference.

16 THE COURT: Ms. Colson, anything to add with regard to
17 the response of question 1?

18 MS. COLSON: No, your Honor.

19 THE COURT: With regard to question 2, why is the
20 status quo order sought? My understanding, am I correct,
21 Ms. Colson, that the status quo order was a stipulation between
22 the parties?

23 MS. COLSON: Well, at the end, yes, your Honor, but
24 initially, my understanding of the Delaware case was that the
25 trust was attempting to control the wind-down process initially

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1 by appointing a receiver or having a receiver appointed. When
2 that wasn't successful, it was the trust that sought the status
3 quo order. At the end of the day, the parties agreed to the
4 basic terms of the order with the exception of whether
5 attorneys' fees would be paid, and that was decided by the
6 court.

7 THE COURT: In other words, I understand that,
8 initially, the approach that was sought by the plaintiff in
9 that litigation, the court denied that or I guess it was a
10 hearing, but that, eventually, the parties reached an
11 understanding, and that understanding is documented in the
12 status quo order. I mean, it's something that I understand
13 being Delaware is something that is, I don't want to say
14 common, but it is something that parties use. What I'm getting
15 at is, it seems like there was an agreement that was reached.

16 MS. COLSON: May I have a moment?

17 THE COURT: Sure. Absolutely.

18 (Pause)

19 MS. COLSON: Just to clarify, I believe that the
20 parties did ultimately agree to the status quo order, but it
21 certainly wasn't the fund's choice, and I would have to further
22 research the details, but it's my understanding that the fund,
23 at the time that it agreed to the status quo order, did so
24 reluctantly because it felt that it was its best option at that
25 point.

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1 THE COURT: Is that because the other option was
2 involuntary petition for bank -- in other words --

3 MS. COLSON: Are we talking about the status quo order
4 or the bankruptcy?

5 THE COURT: The bankruptcy was filed two weeks or
6 three weeks after the status quo order.

7 MS. COLSON: Yes.

8 THE COURT: As I understand it, there were no
9 transactions attempted under the status quo order.

10 MS. COLSON: That's right.

11 THE COURT: Ms. Fletcher, and I apologize for
12 backtracking, how long does the government anticipate its case
13 in chief to be for the trial?

14 MS. FLETCHER: Yes, your Honor. Somewhere between one
15 and two weeks.

16 THE COURT: Thank you.

17 Obviously I'm not going to ask Ms. Colson because you
18 don't necessarily know right now, but in my calendar, I'll set
19 it down for at least a two, probably three-week trial.

20 Let me ask, Ms. Fletcher, do you have anything with
21 regard to question 2?

22 MS. FLETCHER: No, your Honor.

23 And just generally, with respect to the reasons for
24 seeking the status quo order, the Court's questions related to
25 the "why" for some of what was happening in the civil

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1 litigation. I think the government, our response with respect
2 to question 2 is the same as it would have been with respect to
3 question 1, which is that's broadly consistent with our
4 understanding, but I cannot profess to have followed every
5 detail of the civil litigation.

6 THE COURT: I think question 3 is answered, right,
7 there were no transactions. There was no effort to seek
8 permission for transactions over \$50,000 between the filing of
9 the status quo order on September 6th and then the filing of
10 bankruptcy two weeks later. I understand there was a carve out
11 for legal fees.

12 Anything further, Ms. Colson, with regard to this?

13 MS. COLSON: No.

14 THE COURT: And anything from the government?

15 MS. FLETCHER: With respect to question 3, no.

16 THE COURT: So question 4 deals with redemption
17 requests. As I understand it, there were three and then some
18 additional ones thereafter.

19 Let me ask, Ms. Colson, anything further to add to
20 that question?

21 MS. COLSON: No, your Honor.

22 THE COURT: In connection with question 6, which is
23 also related to the status quo order and the question about if
24 the fund had money to fulfill the redemption requests, could it
25 have. So am I correct that at the time that the redemption

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1 requests were made, the fund did not have the liquidity to make
2 the payments on those requests? Putting aside when they might
3 have come due, do you know whether or not the funds had
4 liquidity? In response to question 6, it says the liability
5 totaled millions of dollars, I'm not sure how much that is, but
6 exceeded the amount of liquidity on hand.

7 MS. COLSON: The external facing liabilities I believe
8 totaled somewhere close to \$8 million, which exceeded the
9 amount of liquidity on hand, but the fund was not required to
10 satisfy redemptions in cash, it could have done so in kind.

11 THE COURT: In kind by issuing shares of -- when you
12 say "in kind," what do you mean by that?

13 MS. COLSON: Well, the fund had made a variety of
14 private investments. And so, it could have given investors
15 their percentage of the share in those private investments.

16 THE COURT: I see what you're saying. All right.

17 Anything else with regard to question 4?

18 MS. FLETCHER: Your Honor --

19 THE COURT: I'm sorry. Ms. Colson, I thought you had
20 said no, but maybe I missed that.

21 MS. COLSON: I don't have anything else with respect
22 to question 4, no.

23 THE COURT: Yes, Ms. Fletcher.

24 MS. FLETCHER: Thank you, your Honor.

25 So I don't know if it's strictly in response to

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1 question 4, but I think the sequence of events here and what
2 the investors in the fund understood is I think important for
3 the government -- important to convey to the Court for the
4 government's sort of understanding of the facts and what
5 investors understood they were entitled to.

6 So, in general, the government's case is based on this
7 notion that investors, including the largest investor, which
8 was the Linden West trust, believed that the defendant was
9 engaged in trading in highly liquid securities and other
10 instruments, and did not believe and did not understand him to
11 be directing their funds to these highly illiquid private
12 investments that it now appears he did direct those funds to.
13 And so, in the government's view, the wealth manager came to
14 understand that, in fact, the defendant had not done with
15 investor funds what he had represented he would do, the wealth
16 manager submitted this series of redemption requests that's
17 reflected in item 4.

18 Putting aside whether I think the redemption requests
19 could have been satisfied in kind in theory, what the
20 redemption requests requested was their funds back, and the
21 fund was not in a position to satisfy the redemption requests
22 in cash.

23 As we understand the facts, the defendant did direct
24 investor funds to private investments, some of which were then
25 worthless, others were not easily valuable, which goes to some

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1 of the forthcoming questions. But, in any event, these
2 redemption requests made in June effectively made the fund
3 insolvent and that sort of animated the events that took place
4 over the next several months.

5 THE COURT: Ms. Colson.

6 MS. COLSON: Yes. I mean, a lot of what Ms. Fletcher
7 just said I think is going to be sort of the issue at the
8 trial. It is Mr. Franzone's contention, obviously, that the
9 fund was not insolvent, that these private investments did have
10 value to them, and that the offering documents I think clearly
11 state that you can satisfy redemptions with in kind payments.
12 So those are mere allegations and they haven't been proven yet
13 and they will be the subject of the trial.

14 THE COURT: But aren't certain of those assertions,
15 some of those facts contained in the complaint and in the
16 search warrant affidavit? In other words, what the government
17 contends people said, and I think I go through some of that,
18 what the government contends people said are depositions or
19 affidavits that they submitted. So I understand it's the
20 government's contention, but at least some of it is based upon
21 statements by other witnesses, other than the postal inspector.

22 MS. COLSON: That's correct. I'm not sure exactly
23 what you're referring to, but that is correct, that the
24 complaint largely draws on statements or affidavits made by I
25 believe two or three investors in the fund. But, one of the

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1 government's main contentions, obviously, is that the fund was
2 insolvent and that they're able to demonstrate that because it
3 was not able to satisfy redemptions. That is not accurate.
4 The fund was able to satisfy redemptions, it could have made
5 those redemptions in kind, and that will be proven at a trial.

6 THE COURT: I guess the question that I'm grappling
7 with is do you have the status quo order that provided a means
8 by which operations could continue? And that wasn't done, it
9 wasn't even attempted. So why am I not to infer from that that
10 was basically what was going on here, is that they entered into
11 the status quo order knowing at the time they entered into it
12 they were going to file for bankruptcy? In other words, that
13 they believed that at the time, as you said -- well, whether
14 they believed at the time that it was such an impediment that
15 they couldn't move forward or some other combination of things?
16 Again, this isn't a question that necessarily can be answered.
17 There wasn't an attempt to even try and make a request to have
18 payments done. And I recognize the redemptions may not have
19 technically become due yet, so it would have been other
20 payments of the business, but that wasn't done. So there
21 wasn't even an attempt if there is/was liquidity in the sense
22 of in kind.

23 Let me ask, separately, do you know whether -- I think
24 I know the answer to this -- there were efforts at some other
25 point in time to satisfy, because my understanding is the

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1 redemption requests weren't satisfied, but were there attempts
2 to satisfy them with the private investments in lieu of cash or
3 cash equivalent?

4 MS. COLSON: It's highly complicated, your Honor, but
5 my understanding is there were discussions with the trust
6 before the Delaware litigation commenced about satisfying those
7 investments in kind. Obviously, the parties didn't reach an
8 agreement as to that.

9 THE COURT: I recognize that because it's tied up with
10 the civil litigation and the bankruptcy in particular, there
11 may have been a negotiation that was occurring to try and
12 resolve the issue that included exactly what you're saying.

13 MS. COLSON: And also, just to be clear, it is my
14 understanding that once Mr. Franzone or the fund retained
15 bankruptcy counsel, they were actually advised not to make any
16 payments. And so at that point it wasn't his choice, he was
17 acting on the advice of counsel.

18 THE COURT: Was bankruptcy counsel retained prior to
19 the status quo order, do you know?

20 MS. COLSON: Yes, bankruptcy counsel was obtained
21 prior to the status quo order.

22 THE COURT: So you're concerned about fraudulent
23 conveyances and other things. Okay.

24 Let me ask, Ms. Colson - and this is far afield, it's
25 something you probably don't necessarily have the answer to

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1 right now -- is there going to be some form of advice-of-counsel
2 defense in connection with this case?

3 MS. COLSON: I do not know.

4 THE COURT: I expected that would be the case.

5 So question No. 5, it sounds like it's not only that
6 the status quo order was restrictive, but that there was advice
7 being given that no money should be paid out. Whether that be
8 pursuant to the status quo order or otherwise, it sounds like
9 that's the advice that was being given.

10 MS. COLSON: That's correct.

11 THE COURT: So No. 6, as I understand the response to
12 this question, Ms. Colson, is the fund at the time -- I'm
13 sorry.

14 So the external facing liabilities, including capital
15 calls and expenses. Are the capital calls the redemptions or
16 they're something else?

17 MS. COLSON: No, your Honor.

18 THE COURT: Do you have a sense of what the capital
19 calls and expenses were?

20 MS. COLSON: I do. I believe they totaled
21 approximately \$8 million.

22 THE COURT: That's the \$8 million that you were
23 referring to before.

24 And so, those would have had to have been paid before,
25 as you understand it, the redemptions?

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1 MS. COLSON: That's correct.

2 THE COURT: And those, I take it, would not have been
3 able to be satisfied by in kind payments, that had to be cash?

4 MS. COLSON: It had to be cash.

5 THE COURT: Or a cash equivalent.

6 At this time, the liabilities, in other words, they
7 didn't have cash on hand to pay their bills, basically? In
8 other words, enough cash to pay -- so the capital calls were
9 basically, it's time for you to pony up additional money with
10 regard to investments. Is that an accurate statement?

11 MS. COLSON: With respect to private equity.

12 But I just want to make one thing clear about the
13 external facing liabilities. As far as I understand it, those
14 did not have to be paid right away, all of them. So they
15 didn't have to have the cash on hand to pay all of those. It
16 just became complicated because once the fund announced the
17 wind down, they were required to pay the external facing
18 liabilities first. So that then put pressure on them to pay
19 those immediately, but before they announced the wind down,
20 they were not under the same pressure to pay all of the
21 external facing liabilities immediately.

22 THE COURT: Ms. Fletcher, do you have anything to add
23 with regard to that?

24 MS. FLETCHER: No, your Honor, except to just say
25 that, and I know that your Honor knows this, but these

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1 questions I think are designed to get at whether the postal
2 inspector's statements in the warrant affidavit were in
3 statements he received from other witnesses and information
4 provided by other witnesses. And I think, given the sequence
5 of events, that is a series of redemption requests made to the
6 fund and the fund's decision to file bankruptcy within a matter
7 of months and not pay the redemption requests, it was -- the
8 conclusions of Inspector O'Rourke in the affidavit are wholly
9 reasonable in light of just the series of events.

10 THE COURT: So question 7, as I understand it, that
11 the chief restructuring officer did attempt to locate and
12 verify the existence of assets.

13 So did the chief restructuring officer basically come
14 up with a tally of the existing assets and is that part of any
15 of the information that's currently before me?

16 MS. COLSON: Your Honor, it's my understanding that he
17 did list the assets. So he verified their existence and listed
18 them, but the value he attached to them was the historical
19 value and not the current value.

20 THE COURT: And by historical value, does that mean
21 tied to purchase price or do you not know exactly?

22 MS. COLSON: I don't know exactly.

23 THE COURT: Ms. Fletcher, anything with regard to 7?

24 MS. FLETCHER: So, your Honor, I think what the CRO
25 did was identify the assets, and this is I think addressed in

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1 the next question, but identified the assets, came to
2 understand how the defendant had marked the assets, meaning the
3 value assigned to the individual assets by the defendant, and I
4 think he did undertake some efforts to try to verify whether
5 that valuation was correct or incorrect, but he was not
6 successful in sort of concluding that the valuation provided by
7 the defendant was correct or incorrect with respect to many of
8 them.

9 MS. COLSON: Your Honor, just to respond, because I
10 was taking a look at the CRO's deposition in a civil litigation
11 recently, he stated very clearly during his deposition that he
12 did not attempt to value the assets.

13 THE COURT: Did he say why?

14 MS. COLSON: Because of the unique nature of these
15 investments, that they were private investments in private
16 companies, some of which were quite small.

17 THE COURT: Did he come to the conclusion that some of
18 them were worthless?

19 MS. COLSON: I don't know the answer to that, but I
20 don't think so. I can't answer that question right now. There
21 were 49 investments. I'd really have to look at them one by
22 one.

23 THE COURT: That's fine. It wasn't one of the
24 questions I posed.

25 So I'm not sure I understand, in response to

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1 question 8, you indicate the CRO stated that the fund was the
2 owner of F5 Business and the indirect owner of the assets of
3 F5 Business, and then made I guess what is a similar statement,
4 that the F5 Business debtor held and currently owns the
5 majority of the current investments made by the FF Fund with
6 monies received from the limited partners.

7 So what was the entity that held 80 percent of the
8 fund's assets as of 2018?

9 MS. COLSON: The F5 is the entity that owned
10 80 percent of the assets and the fund owned F5.

11 THE COURT: When you say the "fund owned F5," who
12 created F5?

13 MS. COLSON: Your Honor, the answer to that question
14 is highly complicated. We could try to answer it in writing
15 after this hearing, but I think it's too difficult for me
16 without doing a little more research to answer it orally now.

17 THE COURT: That's fine. Look, some of these
18 questions you may not want to answer because of any number of
19 reasons, and I understand that. If you'd like to submit
20 something after hearing, that's fine, we can talk about a
21 schedule for that at the conclusion of the argument.

22 Ms. Fletcher, would you like to be heard with regard
23 to question 8?

24 MS. FLETCHER: Yes, your Honor.

25 So, there's the FF Fund, which is the fund for which

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1 investors received limited partnership interests. Investors
2 controlled the -- investors have an interest in the main
3 FF Fund. What the CRO learned after the fund filed for
4 bankruptcy was that all of the assets, the private investments
5 that were purchased or investments that were made using the
6 LP's monies were actually controlled not by FF Fund, but by a
7 separate entity called F5 Investments, and that that entity was
8 controlled solely by the defendant. So the LPs, the limited
9 partners with an interest in the fund did not actually have an
10 interest in the F5 entity that controlled the fund's assets.

11 My understanding is that after the fund filed for
12 bankruptcy, the CRO, it's not clear to me exactly how this was
13 resolved, but there was an agreement that F5 transferred its
14 assets to the FF Fund for purposes of the bankruptcy. So I
15 think what is reflected in Ms. Colson's answer here is
16 technically correct, but only beginning in November of 2019.

17 MS. COLSON: Your Honor, we'll respond to that in
18 writing.

19 THE COURT: Okay. With regard to question 9, I think
20 I understand the response.

21 Ms. Fletcher, do you have anything to add with regard
22 to that?

23 Well, first, Ms. Colson, anything to add in regard to
24 the response in question 9?

25 MS. COLSON: Only that I think the difference between

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1 a liquidation and a reorganization is very significant. It's
2 essentially the difference between the assets being fire sold
3 by a liquidating trustee or being held and run by the GP as a
4 going concern.

5 THE COURT: I, in a prior life on the litigation side,
6 had some involvement in some bankruptcies, including the Lehman
7 bankruptcy, so I understand that the plan was there was going
8 to be something at the end of the Chapter 11 that would
9 continue. The idea I guess was it would generate money that
10 could be spun off to satisfy creditors depending upon what the
11 nature of the plan was. I'm not sure I necessarily agree that
12 under a Chapter 7 it would be a fire sale in part because part
13 of the bankruptcy is designed so that it is more orderly than
14 that. But having said that, I think I understand the response
15 to the question, question 9.

16 Ms. Fletcher, anything with regard to question 9?

17 MS. FLETCHER: No. And I think this addresses maybe
18 the next several questions. The government's view is that the
19 difference between a liquidation and a bankruptcy was not
20 material to the issuance of the warrant here.

21 THE COURT: Now, with regard to subsection A to
22 question 9, and just remind me, Ms. Colson, in June, the
23 decision for the wind down, how did that come about? Part of
24 the issue I think is that you mentioned that the wind down
25 would have required that the payment of the external facing

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1 debts be paid first. So the \$8 million became due at that
2 point, I guess in or around June, and the fund, as I understand
3 it, at that time didn't have the money to pay those, but had
4 not yet filed for bankruptcy. So I guess it was implicit
5 that -- I mean, I'm not sure that I necessarily have to solve
6 the insolvency issue, but if they didn't have the money to pay
7 back, and this is pre-bankruptcy, to pay the monies that had
8 become due because of the June 25th wind down announcement, why
9 doesn't that mean they weren't solvent? In other words, the
10 announcement comes, they say we're going to wind down. Part of
11 a wind down process, as I understand it, they need to pay the
12 external liabilities before paying the internal liabilities.
13 So I guess the question perhaps is, was there a plan that they
14 were going to get the \$8 million in order to continue to wind
15 down?

16 MS. COLSON: Your Honor, I think that's a question we
17 need to respond to in writing, as well.

18 THE COURT: Anything else with regard to subsection A,
19 Ms. Colson?

20 MS. COLSON: Your Honor, I would just say that it's
21 highly significant and I probably should have characterized
22 this as an omission in my motion, but it's not only that he
23 misrepresented that the fund was in liquidation, but by making
24 that misrepresentation, it enabled him to omit important
25 information about the restructuring. So I probably should have

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1 characterized that as an omission in responding to your
2 question, I realize how significant it was.

3 THE COURT: And by omission, although not referring to
4 it as a Chapter 7 liquidation, by characterizing it as a
5 liquidation, the omission was not indicating that there was an
6 actual Chapter 11 proceeding going on and what that entailed?

7 MS. COLSON: That's correct.

8 THE COURT: Anything with regard to subsection A,
9 Ms. Fletcher?

10 MS. FLETCHER: Only that the government agrees that
11 the answer to subsection A is no.

12 THE COURT: With regard to subsection B, anything else
13 with regard to that, Ms. Colson?

14 MS. COLSON: No, your Honor.

15 THE COURT: Ms. Fletcher.

16 MS. FLETCHER: No, except the government would agree
17 that the answer to subsection B is no.

18 THE COURT: And with regard to subsection C, I guess
19 my question here is that they couldn't meet, my understanding
20 from the responses, they couldn't meet in June of 2019, there
21 wasn't sufficient liquidity to pay the external facing debts,
22 which were \$8 million. And again, would the response to this
23 be the in kind investments that you had referenced earlier?
24 Because the answer is no, the postal inspector didn't opine
25 that the liquidation was precipitated by Mr. Franzone's

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1 wrongdoing, but the response was that the suggestion was that
2 they sought Chapter 7 protection in September 2019 because they
3 could not meet the redemptions. Is that accurate with regard
4 to they couldn't meet the redemptions in cash or cash
5 equivalents at that time? My understanding is they couldn't
6 pay the liabilities even though they were accelerated. I
7 understand that by indicating a wind down, those liabilities
8 may have been accelerated or they at least had to be satisfied
9 before the payment of any redemptions.

10 Let me ask, actually, and I may have asked this and I
11 apologize if you said that you were going to respond in
12 writing, but was there some plan concerning the wind down on
13 how the external facing liabilities were going to get paid?

14 MS. COLSON: Your Honor, there was a plan with respect
15 to the wind down. We will respond with details, if any, in
16 writing.

17 But just to clarify, again, there's a difference
18 between the external facing liabilities and the internal facing
19 liabilities. The external facing liabilities did have to be
20 paid in cash, but they did not have to be paid all at once.
21 The internal facing liabilities could have been satisfied in
22 kind.

23 THE COURT: Okay. But as I understand it, once the
24 wind down was initiated, the redemptions couldn't be paid until
25 the external facing liabilities were paid?

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1 MS. COLSON: That's correct.

2 THE COURT: So question 10, I think this was, again, a
3 redemption.

4 I'm sorry, Ms. Fletcher, did I turn to you with regard
5 to C?

6 MS. FLETCHER: No, but with respect to section C, the
7 government agrees the answer is no.

8 THE COURT: Okay. I think I understand the response
9 to question 10.

10 Let me ask, was there a plan of reorganization, a
11 Chapter 11 plan of reorganization that was, if not adopted,
12 proposed or was there still in the process of doing that when
13 Mr. Franzone was arrested?

14 MS. COLSON: Your Honor, it had been approved for
15 solicitation by the bankruptcy court. 89, I believe, of 91
16 voting stakeholders had voted to approve the plan, and it was
17 scheduled, I believe, for confirmation just days after
18 Mr. Franzone's arrest. So his arrest interrupted that
19 confirmation process.

20 THE COURT: Were there any objections to the plan of
21 reorganization that you're aware of?

22 MS. COLSON: I believe there were, yes.

23 THE COURT: And the plan of reorganization, how was it
24 structured? In many Chapter 11s, the reason why an entity is
25 impacted is because there are certain obligations they can't

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1 meet and it enables them to manage those. In other words, do
2 you know what the plan of reorganization contemplated with
3 regard to payouts of any of the -- you indicated that 89 of the
4 91 stakeholders -- I'm not sure exactly what that means. Does
5 that mean they're creditors or --

6 MS. COLSON: I think it's both creditors and
7 investors. The two people who objected just incidentally were
8 wealth manager 1 and investor 1.

9 THE COURT: Maybe it makes sense, and I apologize if I
10 have this already, if you can just provide me with whatever the
11 plan was of reorganization that was being considered at the
12 time.

13 MS. COLSON: Okay.

14 THE COURT: Of those stakeholders, do you know how
15 many were independent investors? In other words, non-family
16 members, non-people tied to Mr. Franzone?

17 MS. COLSON: I don't know the exact number, but I can
18 say many.

19 THE COURT: Ms. Fletcher, anything with regard to
20 question 10?

21 MS. FLETCHER: No, your Honor, except the government
22 would agree that the answer to question 10 is no.

23 With respect to the stakeholders in the bankruptcy who
24 objected to the reorganization plan as compared to the two --
25 I'm sorry. I think Ms. Colson is right, the two investors who

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1 objected to the reorganization plan were wealth manager 1 and
2 investor 1.

3 Their funds that were purportedly under the management
4 of the fund at the time of the bankruptcy accounted for
5 something like 95 percent of the fund's assets under
6 management. So you can see, I think Ms. Colson's response to
7 one of the earlier questions, that the redemption request was
8 \$33.7 million. I think, at any given time, the fund's even
9 represented assets under management were something in the
10 35-million range, 35- to 37-million range. So while it is true
11 that only two of the 91 stakeholders objected to the plan,
12 those two individuals had an outsized proportion of their funds
13 with the fund.

14 THE COURT: Do you know, in terms of voting for the
15 plan of reorganization, whether it was all weighted? Was it,
16 just for simplicity, was it one person, one vote, or was it
17 weighted towards the amount that someone had a financial stake?

18 MS. FLETCHER: I don't know, your Honor.

19 THE COURT: I'll take a look if you have the
20 Chapter 11 plan. Again, I'm not at all saying that is
21 necessarily because I -- it's not something that my
22 understanding is that the postal inspector reviewed at all, but
23 I'm just thinking in terms of getting an overall picture of
24 what was going on at the time.

25 MS. COLSON: Just to clarify, I think the postal

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1 inspector said he reviewed -- he was familiar with the
2 bankruptcy litigation. So I'm assuming he actually did review
3 the plan.

4 THE COURT: Yes, Ms. Fletcher.

5 MS. FLETCHER: Your Honor, I think the affidavit says
6 that he reviewed filings in the bankruptcy proceeding. I don't
7 think there was ever a representation that he reviewed the
8 reorganization plan.

9 THE COURT: With regard to question 11, with regard to
10 the issue of June 2019 versus September 2019, Ms. Fletcher, I
11 guess my first question is, do you have a sense of where June
12 2019 came from? For some reason, I have a vague recollection,
13 I may have asked this before, but I don't remember.

14 MS. FLETCHER: No, your Honor. Let me pull up the
15 relevant section of the complaint.

16 Your Honor, here's what I think happened. I think the
17 language that's in the complaint is correct, and I think what
18 we say in our opposition, citing to paragraph 11D of the
19 complaint, beginning in or about June of 2019, several of
20 wealth manager 1's clients, including the trust, sent FF Fund
21 redemption requests. FF Fund did not fill the redemption
22 requests and instead filed for bankruptcy protection. That's,
23 as I said, paragraph 11D in the complaint. And that is the
24 sequence of events as articulated in that paragraph is correct,
25 that is the sequence of events as Postal Inspector Gannon, who

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1 swore out the complaint, affirmed; and as Postal Inspector
2 O'Rourke, who reviewed the complaint, agreed.

3 I think what happened is the date, June 2019, as
4 contained within that paragraph was applied to the date of the
5 bankruptcy in the search warrant affidavit erroneously, but I
6 think that is the source of the error.

7 And to answer your Honor's question, I don't believe
8 that anyone realized that error until Ms. Colson pointed it
9 out.

10 MS. COLSON: Your Honor, I would just note that in
11 paragraph 14A of the complaint, again, it actually states that
12 the fund filed for bankruptcy in September of 2019, and that is
13 incorrect.

14 THE COURT: I thought that --

15 MS. COLSON: That is correct. I'm sorry.

16 MS. FLETCHER: That is actually correct. Yes, your
17 Honor, I think that is correct. I think the problem is with
18 reference to 11D instead of cross-referencing A, which did, to
19 Ms. Colson's point, accurately set forth the date of the
20 bankruptcy.

21 THE COURT: My understanding is that the search
22 warrant affidavit included, by reference, the complaint.

23 MS. FLETCHER: It did. It did incorporate the entire
24 complaint by reference, but it cited directly to 11D which,
25 again, I think is the source of the error.

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1 THE COURT: Anything else on 11 from either party?

2 MS. FLETCHER: Your Honor, just to make clear, I think
3 to the extent your Honor is asking if we knew, if the
4 government knew that the bankruptcy petition was filed in
5 September 2019, the answer to that is yes, but I think what we
6 didn't realize, until Ms. Colson pointed it out in her motion,
7 is that the paragraph in the affidavit incorrectly says June of
8 2019.

9 MS. COLSON: The issue there is, though, in
10 incorrectly stating that the bankruptcy was filed in June, that
11 incorrect statement then allowed Inspector O'Rourke to connect
12 it directly to the inability to pay redemptions because,
13 obviously, the redemption request was also made in June.

14 THE COURT: When you say "directly," he never stated
15 that. In other words, my understanding is that because you say
16 implicitly that that's the connection that was being drawn, but
17 in fact --

18 MS. COLSON: I think he states that the fund was
19 unable to satisfy redemptions and thereafter filed for
20 bankruptcy. In fact, the government makes the connection
21 itself in its own motion papers. It is what the government
22 alleges. So our understanding of O'Rourke's representation, I
23 believe, is exactly what the government meant to imply.

24 MS. FLETCHER: Your Honor, I think those are two
25 different points. I think your Honor is correct that Inspector

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1 O'Rourke's affidavit does not explicitly link the redemption
2 requests from June of 2019 to the bankruptcy filing. But I
3 think what Ms. Colson is arguing here is that by including an
4 incorrect date in the affidavit, Inspector O'Rourke created a
5 misimpression that the redemption requests and the bankruptcy
6 were linked. And the government's response to that is that to
7 the extent that it created -- that his affidavit created the
8 impression that the redemption requests were linked to the
9 bankruptcy, that was not a misimpression. That was, in fact,
10 an accurate impression that the redemption requests were
11 requests that the fund couldn't satisfy and that these series
12 of events that followed, the civil litigation in Delaware, the
13 status quo order, the wind down, Mr. Franzone's consultation
14 with bankruptcy counsel, and an ultimate decision to file for
15 bankruptcy were all a series of events in a causal chain,
16 essentially beginning with wealth manager 1's confrontation of
17 the defendant, the discovery of the defendant's fraud, an
18 effort to get investor money out of the fund, that effort being
19 unsuccessful, and ultimately there being a bankruptcy.

20 MS. COLSON: Obviously, we dispute that description of
21 events, starting with the fund's inability to meet redemptions.
22 And as we stated previously, and can go into more detail in
23 writing, the fund was in negotiations with investor 1 to
24 satisfy redemptions in kind. Those negotiations did not prove
25 fruitful and that's what ultimately led to the wind down

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1 announcement.

2 THE COURT: So I think I understand. Let me ask,
3 question 12, Ms. Fletcher, I think I understand, based upon the
4 response to question 11, what may have transpired. In terms of
5 the liquidation, what is the express language in the complaint?

6 MS. FLETCHER: So, your Honor, I think the complaint
7 in paragraph 11D does make clear that the fund filed for
8 bankruptcy, but to Ms. Colson's point, in 14A described the
9 fund as being in the process of being liquidated. Your Honor,
10 I think that's the error that was pointed out in the earlier
11 motion to suppress round of briefing.

12 So the answer to question 12 is yes, it was known to
13 the government, that the fund was not in the process of
14 liquidating at the time that the -- I'm sorry. That it was not
15 in the process of liquidating at the time the complaint was
16 filed, but we learned that, again, following the argument in
17 the motion to suppress.

18 And so, I think what we should have done here or I
19 think what we wish we had done was included a footnote in the
20 affidavit saying to the extent the complaint says liquidating,
21 it's actually just bankruptcy, and we didn't do that, and that
22 was an oversight on the government's part. But for the reasons
23 I think we articulated in our briefing, to the extent there's a
24 difference between bankruptcy and liquidation, that's -- to the
25 extent there's a distinction between those terms, I think it's

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1 a distinction without a difference in this context where, in
2 either event, the series of events set forth in the complaint
3 is accurate and the impression created is accurate.

4 THE COURT: Let me ask, with regard to the wind down
5 in June that was announced in June of 2019, I take it that
6 that -- well, let me ask, is that the wind down? In other
7 words, if I look at the transaction documents for the fund and
8 other things, is "wind down" a part of that or was this
9 something that isn't necessarily contemplated in the documents,
10 the underlying documents of the fund? It was just -- I guess
11 my question goes to, wouldn't the wind down have led to the
12 liquidation of the fund?

13 MS. COLSON: Your Honor, I think that question is too
14 complicated for me to answer now.

15 THE COURT: Okay. And it may be and I don't know
16 whether in connection with the wind down there was a document
17 saying this was going to be the process for the wind down or
18 something like that, or whether it is really just a term of art
19 for a fund like the fund that was present here. So if you
20 want, Ms. Colson, you can respond in writing to that.

21 So question 13, I think I understand the response to
22 that question.

23 Ms. Colson, is there anything you wish to add to that
24 response?

25 MS. COLSON: No, your Honor.

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1 THE COURT: Ms. Fletcher.

2 MS. FLETCHER: Your Honor, we would agree that the
3 answer to question 13 is no.

4 THE COURT: And I think I understand question 14,
5 which is a similar response, and it references back --
6 actually, this was almost a repetition of an earlier question,
7 which was question 6.

8 But anything else with regard to that question,
9 Ms. Colson?

10 MS. COLSON: No, your Honor.

11 THE COURT: Ms. Fletcher.

12 MS. FLETCHER: No, we agree the answer is no.

13 THE COURT: In connection with question 15, let me
14 ask, does the government know or have a sense of whether it was
15 factually accurate that investors did receive performance
16 reports that were emailed from the Google address? Do you have
17 a sense, Ms. Fletcher, the frequency with which that happened
18 at all?

19 MS. FLETCHER: If what your Honor means is for how
20 many investors that happened, no, but with respect to the
21 investor that I think is contemplated in the affidavit, it was
22 every month for a period of six months.

23 THE COURT: So, Ms. Colson, in response to question
24 15, I understand that there was a process by which monthly
25 performance reports could be accessed by logging into -- well,

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1 let me ask, Ms. Fletcher, do you know, in terms of the
2 performance reports, with regard to logging in, was that
3 something that people or investors could readily do, do you
4 know?

5 MS. FLETCHER: I don't know, your Honor. But what I
6 will say is that the -- so the answer to question 15 is yes,
7 it's factually accurate that the defendant provided investors
8 with monthly performance reports attached to emails. Often,
9 what the defendant would do in those emails is say something
10 like this is also available on Intralinks. I candidly don't
11 remember as I stand here whether any individual investors had
12 issues accessing Intralinks.

13 THE COURT: And do you know whether the performance
14 reports that were mailed from the Google address, were they
15 consistent with the reports that were on Intralinks?

16 MS. FLETCHER: That, I don't know. I just haven't
17 done a comparison of the two types of reports.

18 MS. COLSON: So if I understand what the government is
19 saying correctly, they have evidence that one investor received
20 six performance reports by Gmail and cannot establish that any
21 other investors received performance reports by Gmail. My
22 understanding is that the default option for investors was to
23 access the reports through Intralinks, that they would receive
24 an email directly from Intralinks, not from Gmail, every month
25 reminding them to log in, and they had a login and password,

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1 and it was quite simple to do so.

2 THE COURT: Question 16, I think I understand the
3 issue there, but anything to add with regard to the response to
4 question 16?

5 MS. COLSON: No, your Honor.

6 THE COURT: Ms. Fletcher.

7 MS. FLETCHER: No, only that we agree that the answer
8 is no.

9 THE COURT: Mr. Shikiar, my recollection is that
10 Mr. Shikiar was introduced via email by -- and I don't remember
11 the gentleman's name, but was that other person a registered
12 investment advisor, I think? Ms. Fletcher, do you know?

13 MS. FLETCHER: Yes. So the person who introduced
14 Mr. Shikiar by email is Greg Hersch. That's wealth manager 1.
15 He's the individual who is the registered investment advisor
16 representing the trust that invested most of the funds under
17 management with FF Fund. Mr. Greg Hersch was also the
18 registered investment advisor for a number of other individual
19 investors that invested with the fund.

20 THE COURT: So Hersch was an RIA and he was an
21 investor. Is that an accurate statement?

22 MS. FLETCHER: So Greg Hersch is the founder of
23 Florence Capital, which is a registered investment advisor, and
24 his clients --

25 THE COURT: Invested.

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1 MS. FLETCHER: -- invested with the fund at
2 Mr. Hersch's suggestion/direction.

3 THE COURT: Anything else with regard to question 17,
4 Ms. Colson?

5 MS. COLSON: No.

6 THE COURT: 18 is straightforward.

7 19 I think is straightforward.

8 Am I correct, in response to question 20, one of the
9 things that RIAs would do is suggest to clients to invest or
10 make the investment for the clients? Are you suggesting that
11 the implication from what the postal inspector said was that
12 that was the only -- in other words, why wouldn't an RIA, yes,
13 they could do other things, but they're also a prospective
14 investor.

15 MS. COLSON: Because the fund used RIAs for different
16 purposes. Yes, there were RIAs who the fund looked to and had,
17 you know, to make investments on behalf of clients, but then
18 the fund used other RIAs for different purposes, and the RIAs
19 that it used for different purposes did not also make
20 investments on behalf of clients. Just to say somebody is a
21 registered investment advisor, it doesn't necessarily indicate
22 or mean that that registered investment advisor has been hired
23 by the fund or retained by the fund to make investments on
24 behalf of clients.

25 THE COURT: Ms. Fletcher, anything with regard to

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1 question 20?

2 MS. FLETCHER: Yes, your Honor. I think that I would
3 just point your Honor to the portion of Greg Hersch's email
4 that we quote in our opposition brief because I think the
5 context there is important. He says Stewart has built an
6 impressive business over the past three decades and is
7 interested in learning more about your fund. So I think for
8 postal Inspector O'Rourke to read that email and characterize
9 Mr. Shikiar as a perfective investor in the fund is a totally
10 fair reading of that email. And therefore, his statements
11 characterizing Mr. Shikiar, while it was a characterization,
12 are not untrue.

13 THE COURT: I think I understand subsection A, that
14 there would have been a process, if there was going to be an
15 investment, whether it's know your client or know your customer
16 or something like that. But am I correct, they wouldn't
17 necessarily have had to have met in person, there would have
18 been a form or some sort of paperwork that a prospective
19 investor would have to fill out before then and perhaps other
20 things before they could make an investment?

21 MS. COLSON: Yes, there is a process, your Honor. I
22 don't know that Mr. Franzone met every investor in person
23 because I don't know that every investor was located in
24 New York or Florida, but yes, there was an extensive process
25 that he had to go through before someone could invest in the

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1 fund.

2 THE COURT: Anything, Ms. Fletcher, with regard to
3 subsection A?

4 MS. FLETCHER: Your Honor, we would just answer the
5 question no.

6 THE COURT: Subsection B, I think that's
7 straightforward.

8 Anything else, Ms. Colson, on subsection B?

9 MS. COLSON: No, your Honor.

10 THE COURT: Ms. Fletcher.

11 MS. FLETCHER: No, your Honor.

12 THE COURT: Subsection C I think I understand.

13 Anything further on that, Ms. Colson?

14 MS. FLETCHER: No, your Honor.

15 THE COURT: Let me ask Ms. Fletcher, on subsection C,
16 with regard to either part, in the next section, Ms. Colson
17 indicates that the fund paid the \$75,000, not Mr. Franzone. Do
18 you have any insight on that? She indicates that that was
19 incorporated because paragraph 8E of the complaint includes
20 comments about that.

21 MS. FLETCHER: Your Honor, I would just say that I
22 think Franzone sending investor 2 the funds would be a true
23 statement, whether he directed those funds to be paid from a
24 fund bank account or from his personal bank account. I don't
25 know as I stand here from which account in fact the funds were

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1 sent, but it is accurate that investor 2 stated that she
2 received the funds directly from Andrew. Whether investor 2
3 could perceive the difference between an Andrew Franzone
4 controlled bank account or a fund controlled account, that, I
5 don't know.

6 THE COURT: I don't know the statement, "received the
7 funds directly from Andrew," was that something that was in --
8 let me just see. I mean, 8E says on one occasion, in or about
9 2016, investor 2 requested \$75,000 from investor 2's account at
10 the FF Fund, and Franzone promptly sent investor 2 the funds.

11 So Ms. Colson, you're saying that the implication
12 there is that, somehow, he's using his personal account?

13 MS. COLSON: I believe that is the implication, your
14 Honor. And I believe that because it came directly from
15 investor 2's affidavit in which she clearly stated that she
16 sought a redemption from the fund, but that the money was sent
17 to her by Mr. Franzone, and she made a clear distinction in her
18 affidavit.

19 THE COURT: Let me ask, was there a process for
20 redemptions that could be accelerated? It seems as if the
21 redemption request was made and then the monies were
22 forthcoming as opposed to other redemption requests. As I
23 understand it, once they were made, they didn't have to be
24 satisfied until -- so they're made in one quarter and then
25 they're satisfied at some other period of time. Is this some

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1 other type of redemption?

2 MS. FLETCHER: Your Honor, when investor 2 uses the
3 word "promptly," I don't know what she means by that and how
4 promptly the funds were returned to her. So I can't answer
5 that question.

6 THE COURT: Here's the implication, right, the squeaky
7 wheel gets the grease or whatever the saying is. In other
8 words, there was a process for redemptions, that process would
9 take a certain period of time. Investor 2 was like, I want my
10 money and in order to -- again, it could be read in order to
11 placate investor 2, the money, whether it was sent, and I grant
12 it, the funds were made available to, the redemption was put
13 through, and that's what I was trying to figure out, but I
14 understand that -- well, let me ask Ms. Fletcher, do you know
15 what the timing was in connection with that redemption that's
16 referenced in 8E?

17 MS. FLETCHER: Off of the top of my head, no, except
18 that in 8E, it says on one occasion in or about 2016, which is
19 quite a few years before I would say the collapse of the fund.

20 I would also note, just because I think your Honor may
21 be reading this one way, which is that investor 2 was
22 complaining. I think, actually, perhaps a more accurate
23 reading is informed by the fact that during this period of
24 time, 2016 --

25 THE COURT: Things were liquid?

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1 MS. FLETCHER: No. Maybe more liquid. But what I was
2 actually going to say was that investor 2 and the defendant
3 were very close personally. And so, I think rather than I
4 think as your Honor was maybe hypothesizing that investor 2 was
5 angry, I think it was more likely that she was given preference
6 over other investors. Also, her redemption request at this
7 time was relatively small. And relative to the, you know,
8 the -- relative to the redemption requests that were made in
9 2019.

10 MS. COLSON: Your Honor, I just wanted to -- I think
11 we're reading a lot into this one statement. So I really -- I
12 don't know the timing of the redemption and I don't think the
13 government knows either.

14 I would just note, since we're discussing prior
15 redemptions, that up until June 2019, the fund satisfied every
16 redemption request that was ever made, and that totaled in the
17 millions of dollars.

18 THE COURT: Subsection D, anything to add, Ms. Colson,
19 with regard to that?

20 MS. COLSON: No.

21 THE COURT: Ms. Fletcher.

22 MS. FLETCHER: No, your Honor.

23 THE COURT: So I think I understand, obviously,
24 question 21 deals with cases, so I will take a look at those
25 cases, but as I understand, there's no case directly on point,

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1 but that the Eleventh Circuit is informative, as well as in
2 connection with 21. And *Shipp* is Judge Garaufis' case; is that
3 correct?

4 MS. COLSON: That's correct.

5 THE COURT: Ms. Fletcher, anything in regard to
6 question 21?

7 MS. FLETCHER: No, your Honor. I mean, I think what
8 your Honor asked is if Ms. Colson could point your Honor to a
9 case in which a judge had done, which she's asking the Court to
10 do here, and she was not able to identify a case.

11 THE COURT: Question 22, I think I understand the
12 response there, and there are various cases cited.

13 Anything to add with regard to that, Ms. Colson?

14 MS. COLSON: Your Honor, I just want to respond to
15 what the government said because it is, first of all, these
16 questions were posed to both of us, I don't think they were
17 just posed to me. We were the only ones who chose to answer
18 them.

19 But I would say that while there is not a case
20 directly on point, and the argument that we have made is
21 somewhat unique in this case, I think it's actually quite
22 simple argument, which is that the allegations in the complaint
23 focused on Mr. Franzone's use of his Gmail account exclusively.
24 There were no allegations that concerned the use of any other
25 Google applications, and yet the warrant allowed the government

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1 to search and seize his entire Google account. So in that
2 sense, it was overbroad because it exceeded the factual
3 allegations in the complaint establishing probable cause.

4 We have found analogous cases, and most notably *United*
5 *States v. Shipp*, which deals with a warrant to search and seize
6 an entire Google account, which I believe is quite similar for
7 the reasons stated in my answer to a Google account.

8 THE COURT: Facebook.

9 MS. COLSON: Facebook, correct.

10 THE COURT: Is there anything in the search warrant
11 affidavit – and this just occurred to me – that indicates that
12 these accounts, that either it was known or is it common that
13 these Google accounts would be linked in some sort of way?

14 MS. FLETCHER: Your Honor, so yes, and this is
15 described on page 14 of our opposition brief. So the search
16 warrant is directed to Google for the evidence contained within
17 a single account and that account contains different types of
18 data. I think what Ms. Colson is arguing is that we articulate
19 in the search warrant affidavit only probable cause to believe
20 that the defendant used the Gmail component of Google and did
21 not use some of the other applications that would have data and
22 be contained within the broader Google account, but the search
23 warrant affidavit specifically laid out what a lot of those
24 other functions are and how they work, and it described
25 probable cause to believe that the defendant did a whole bunch

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1 of things, the data for which would be included in those other
2 applications. For example, we say or Inspector O'Rourke said
3 in his search warrant affidavit that individuals like the
4 defendant who engage in fraud schemes use electronic devices
5 and accounts to keep track of coconspirators and victims'
6 contact information. So that's the type of data that would be
7 included in a Google account within Google contacts, not
8 necessarily within Gmail.

9 He also described how the communications could be
10 included in email and electronic messages and images. So
11 images would not necessarily be contained within the Gmail
12 component of Google and would instead be contained potentially
13 in an application called Google Photos for chats, the data
14 could be contained within Google Hangouts.

15 So I certainly won't read the rest of this to your
16 Honor, but I think the point is that we articulated -- postal
17 Inspector O'Rourke articulated in the affidavit the types of
18 evidence that might exist and explained the different
19 applications that were contained within an individual Google
20 account.

21 And just with respect to No. 21, to the extent that it
22 was unclear, your Honor, I understood the question to be
23 directed to me also. I'm also not aware of any case in which
24 the court has suppressed evidence seized from a defendant's
25 Google application based on the argument that the search

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1 warrant affidavit only related to one Google application.

2 But also, I would point your Honor to the section of
3 the opposition that we just discussed, which is to say the
4 affidavit here doesn't only relate to one Google application,
5 it relates to a number of Google applications.

6 MS. COLSON: Your Honor, I think that's incorrect. I
7 think that the specific factual allegations in the affidavit
8 relate to one Google application. Agent O'Rourke did state
9 that in his expert opinion, criminals typically use Google for
10 X, Y, and Z reasons, but he didn't actually provide any
11 evidence of Mr. Franzone's behavior as such.

12 So, for example, there is no evidence that
13 Mr. Franzone used Google to keep track of contact information,
14 that Mr. Franzone used Google Hangouts, that Mr. Franzone used
15 Google Docs. And so, without those specific factual
16 allegations, the opinion of an expert that criminals typically
17 do X, Y, or Z is insufficient, and we have cited case law in
18 our reply brief to support that.

19 THE COURT: Why wouldn't this be -- wouldn't many of
20 these things that say, and this is a separate issue, but
21 wouldn't many of these things be on a phone? So a search
22 warrant for a phone may have an affidavit for the phone, some
23 of it may be generic sort of, the experience-type thing, but
24 some of it may be specific information with regard to emails
25 that the person is or the government knows or the postal

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1 inspector or whoever the affiant is indicates they have emails
2 that indicate this, but the application is for the phone and
3 evidence of crimes on the phone, which could include Gmail, it
4 could include photos, it could include all sorts of things.
5 Why is it analogous to that sort of an application?

6 MS. COLSON: It is somewhat analogous, but of course a
7 phone is one singular device. So once you have it in hand, and
8 typically, when the government seeks a search warrant to search
9 an individual's phone, they've already seized that phone upon
10 arrest or upon searching an individual's apartment or home. In
11 this case, it's very different because the government was able
12 to make a choice before going to Google and it could have
13 easily limited its search warrant application to avoid these
14 sorts of constitutional concerns.

15 THE COURT: Question 22, so I think I understand.

16 Is there anything, Ms. Colson, you wish to add in
17 connection to question 22?

18 MS. COLSON: No, your Honor.

19 THE COURT: Ms. Fletcher.

20 MS. FLETCHER: Nothing to add, your Honor.

21 THE COURT: Question 23, so I think I understand that
22 the argument is basically there's no probable cause and
23 therefore the agent, the postal inspector couldn't rely on it
24 because it was so devoid of probable cause.

25 MS. COLSON: The argument is that there was no

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1 probable cause with respect to the non-email applications in
2 Google.

3 THE COURT: Ms. Fletcher, anything with regard to
4 question 23?

5 MS. FLETCHER: No, your Honor. I mean, I think the
6 arguments that I made with respect to question 21 apply equally
7 here.

8 THE COURT: Ms. Colson, I note there have been various
9 points where you've indicated that there may be some additional
10 things you want to submit in writing, but is there anything you
11 would wish to add at this time with regard to the papers
12 related to the Google search warrant?

13 MS. COLSON: No, your Honor.

14 THE COURT: Ms. Fletcher, anything that you wish to
15 add with regard to the government's papers with regard to the
16 Google search warrant?

17 MS. FLETCHER: Your Honor, just briefly, because I
18 know that your Honor had a lot of factual questions, and I know
19 your Honor is familiar with the standard, but I would just
20 remind your Honor that the idea here, what your Honor's being
21 asked to consider is not whether there were technical
22 inaccuracies in the affidavit, but whether there is a -- the
23 errors were of a type and of a character and were put into the
24 affidavit demonstrating that the inspector intended to mislead
25 the magistrate. And I think in light of what the errors --

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1 what the alleged errors were, which are either very technical
2 errors or not in fact errors at all, the defendant has not made
3 the substantial showing that Inspector O'Rourke acted with the
4 intent or with the reckless disregard that he was deceiving the
5 magistrate. So the defendant's motion should be denied and
6 there is not even a substantial showing made that would justify
7 a *Franks* hearing here.

8 MS. COLSON: I do want to respond.

9 THE COURT: Sure.

10 MS. COLSON: In order to get a *Franks* hearing, you
11 would have to make a substantial preliminary showing of
12 material misstatements and recklessness, and I believe we have
13 met that burden. We identified for the Court five
14 misstatements made by O'Rourke. We also identified material
15 information linked to those misstatements that O'Rourke
16 neglected to include, and that could probably be characterized
17 as omissions. I'm referring in particular here to all of the
18 information about the reorganization process. We have shown
19 that those statements were material. They materially affected
20 the magistrate judge's understanding of the nature and timing
21 of the bankruptcy process, which, in turn, affected her view of
22 the principal allegations of fraud in the complaint and in
23 O'Rourke's affidavit, including particularly that the fund was
24 insolvent, that the fund was unable to meet redemptions, and
25 that the fund's investments were worthless or significantly

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1 impaired.

2 I believe we have also met the standard for
3 recklessness. In fact, we demonstrated that by the time
4 O'Rourke wrote the affidavit in December of 2022, he already
5 knew that there were certain facts in the complaint that were
6 incorrect and he failed to correct them, and that includes the
7 timing of the bankruptcy, the nature of the bankruptcy
8 proceedings. I believe we've also demonstrated in our papers
9 that he knew or should have known that the CRO was court
10 approved rather than court appointed.

11 So I believe we have met the standard both for
12 materiality and recklessness, and certainly we have made a
13 substantial preliminary showing of that.

14 THE COURT: Thank you.

15 So, Ms. Colson, in terms of any additional submissions
16 you'd like to make, how much time would you like to do that?

17 MS. COLSON: It's going to take some research, your
18 Honor, so I would ask for four weeks.

19 THE COURT: And Ms. Fletcher, to the extent you want
20 to respond, I'll let you do that. As soon as Ms. Colson files
21 her letter or papers with regard to that, let me know how much
22 time you would need to respond or if you're not going to
23 respond, that's fine.

24 MS. FLETCHER: Will do, your Honor.

25 THE COURT: Is there anything else that we should deal

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1 with today? From the government.

2 MS. FLETCHER: No, your Honor. Thank you.

3 THE COURT: From the defense.

4 MS. COLSON: No, your Honor.

5 THE COURT: Thank you very much. And I apologize,
6 unfortunately, for my late questions. I just find it, and
7 perhaps I need to focus earlier, but I find it useful if I put
8 my questions down so that the parties are prepared to answer
9 the questions rather than having an oral argument where I ask
10 questions and the parties need to come back to me.

11 Thank you very much. We'll stand adjourned.

12 * * *